SOUTHERN BANK BHD

v.

ABDUL RAOF RAKINAN & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
KC VOHRAH J
[CIVIL APPEAL NO: R1-12-293-99]
4 SEPTEMBER 2000

CIVIL PROCEDURE: *Summary judgment - Application for - Application for summary judgment against guarantor - Guarantor the wife of principal debtor - Defence of undue influence by wife - Whether available to wife in action by lender - Whether there were triable issues*

The plaintiff granted an overdraft facility to the first defendant. The second defendant who was the wife of the first defendant stood as guarantor. The plaintiff sued and obtained judgment in default against the first defendant.

The second defendant defended the plaintiff's claim and alleged undue unfluence on the part of the first defendant on her at the time she executed the guarantee agreement.

The plaintiff's application for summary judgment against the second defendant was dismissed and the plaintiff appealed.

Held:

[1] Section 16 of the Contracts Act 1950 as well as decided cases make it clear that there is no presumption of undue influence between husbands and wives. However, where a wife has been induced to stand surety for her husband's debt by his undue influence, she has an equity as against him to set aside the transaction.

[2] In the present case the question was whether the plaintiff was put on inquiry when the second defendant offered to stand surety for her husband's debt, which was not to her financial advantage and which carried a substantial risk of the husband committing a legal or equitable wrong against her. If so, the question whether the plaintiff had taken reasonable steps to ensure that the contract to stand surety had been properly obtained was a triable issue.

[3] The second defendant's contention that the plaintiff had entrusted the first defendant with the duty to obtain her consent to execute the guarantee was tantamount to saying that the plaintiff as principal had authorised the first defendant to act on behalf of the plaintiff to bring the second defendant into contract with the plaintiff. This was a triable issue.

[Appeal dismissed with costs.]

Case(s) referred to:
Banco Exterior Internacional v. Mann & Ors [1995] 1 All ER 936 ***(refd)***
Barclays Bank plc v. O'Brien [1994] 1 AC 180 ***(foll)***
Public Finance Bhd v. Lee Bee Rubber Factory Sdn Bhd [1994] 2 CLJ 646 ***(foll)***
TSB Bank Plc v. Camfield & Anor [1995] 1 All ER 951 ***(refd)***

Legislation referred to:
Contracts Act 1950, s. 16

For the plaintiff - Kingston Tan; M/s Heily Hassan Tan & Partners
For the 2nd defendant - HC Hiew; M/s Hiew & Loh

Reported by Satish Nair

JUDGMENT

KC Vohrah J:

This is an appeal by the plaintiff against the decision of the Sessions Court which dismissed the application of Southern Bank Berhad, for summary judgment against the 2nd defendant Norlela bte Baharudin.

The plaintiff in the court below granted an overdraft facility to the 1st defendant. According to the memorandum of continuing guarantee and indemnity, in consideration of that facility to the 1st defendant, the 2nd defendant (the wife of the 1st defendant and now the respondent) executed with the plaintiff the said guarantee on 21 January 1997 to indemnify and make repayments on all advances made by the plaintiff to the 1st defendant including all interest, commission and banking charges therein.

The plaintiff sued the 1st defendant for RM32,722.33 owed under the facility together with interests and costs. The 2nd defendant was sued as a guarantor under the same action.

The plaintiff obtained judgment in default of appearance against the 1st defendant on 3 November 1997.

The 2nd defendant in the meantime had put in a defence. She admitted signing the guarantee but she claimed that she had signed it under the "undue influence" of the 1st defendant on her.

The plaintiff then filed an application for summary judgment against the 2nd defendant under O. 26A.

Under cl. 1 of the guarantee with the plaintiff (see p. 54 of Appeal Record) the 2nd defendant "hereby guarantee(s) to you the due payment of and undertake(s) on your demand to pay to you all sums which now are or may hereafter from time to time become owing to you anywhere by the Principal ..."

The plaintiff's solicitors issued a letter of demand on 31 May 1997 demanding for the payment of RM32,772.33 as at 23 May 1997 together with continuing interest until date of full realisation.

Clause 7 of the guarantee has this provision:

> ... any judgement ... obtained by you against the Principal ... or any statement of account transmitted by you the correctness of which is certified by anyone of ... your duly authorised officers shall be binding and conclusive against (me) ... in all courts of law ...

Judgment in default was obtained by the plaintiff against the 1st defendant on 3 November 1997 and the plaintiff's statement of account as at 23 May 1997 (exh. FYK, p. 70 of Appeal Record) fall within the cl. 7 and therefore appear to be binding and conclusive against the 2nd defendant as to the outstanding sum owed by her to the plaintiff.

The 2nd defendant's defence is that she had signed the guarantee under the undue influence of the 1st defendant who was her husband. She sets out the particulars of undue influence in paras. 4 to 7 of her defence and raises them in paras. 6 to 12 of her affidavit in reply opposing the O. 26A application.

Section 16 of the Contracts Act 1950 is the provision dealing with undue influence. And the cases are clear that there is no presumption of undue influence between husband and wife. As was observed in *Public Finance Bhd v. Lee Bee Rubber Factory Sdn Bhd* [1994] 2 CLJ 646 at 652 by Edgar Joseph Jr SCJ (sitting as a High Court judge):

> Certain considerations relevant to the third defendant's plea of undue influence may now be dealt with shortly.
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> There is ample authority to show that certain classes of relationship by themselves and nothing more do give rise to a presumption of undue influence; examples are: parent and child (see *Phillips v. Hutchinson* [1946] VLR 270), a person in *loco parentis* and his charge (see *Bank of New South Wales v. Rogers* [1941] 65 CLR 42), guardian and ward (see *Taylor v. Johnson* [1882] 19 Ch D 603), doctor and patient (see *Radcliffe v. Price* [1902] 18 TLR 446), solicitor and client (see *Westmelton (Vic) Pty Ltd v. Archer* [1982] VR 305),

spiritual adviser and a member of his congregation (see *Allcard v. Skinner* [1887] 36 Ch D 145), a man and his fiancee (see *Yerkey v. Jones* [1939] 63 CLR 649 at p. 675) and perhaps trustee and beneficiary (see *Wheeler v. Sargeant* [1893] 69 LT 181).

Most people would think that a conspicuous omission from the list aforesaid is that of husband and wife. However, the case of *Yerkey v. Jones*, per Dixon J at p. 675, shows that the approach of the courts is that there is nothing unusual in a wife showing her affection for her husband in a tangible way, as for example, by guaranteeing repayment of his debts. And, so, it is said, that the affection and confidence inherent in the marital state does not, *ipso facto*, amount to undue influence in the eyes of the law. (See *Colonial Bank of Alasia v. Kerr* [1889] 15 VLR 74).

I could not therefore hold, having regard to the authorities cited above, that simply by reason of the relationship of husband and wife existing between the second and third defendants, a presumption of undue influence arose.

However, where a wife has been induced to stand surety for her husband's debt by his undue influence, she has an equity as against him to set aside the transaction: *Barclays Bank plc v. O'Brien* [1994] 1 AC 180.

But first there is need to set out the analysis of Lord Browne-Wilkinson on the law of undue influence, at 190:

Undue influence

A person who has been induced to enter into a transaction by the undue influence of another ("the wrongdoer") is entitled to set that transaction aside as against the wrongdoer. Such undue influence is either actual or presumed. In *Bank of Credit and Commerce International SA v. Aboody* [1990] QB 923, 953, the Court of Appeal helpfully adopted the following classification.

Class 1: Actual undue influence

In these cases it is necessary for the claimant, to prove affirmatively that the wrongdoer exerted undue influence on the complainant to enter into the particular transaction which is impugned.

Class 2: Presumed undue influence

In these cases the complainant only has to show, in the first instance, that there was a relationship of trust and confidence between the complainant and the wrongdoer of such a nature that it is fair to presume that the wrongdoer abused that relationship in procuring the complainant to enter into the impugned transaction. In Class 2 cases therefore there is no need to produce evidence that actual undue influence was exerted in relation to the particular transaction impugned once a confidential relationship has been proved, the burden then shifts to the wrongdoer to prove that the complainant entered into the impugned transaction freely, for example by showing that the complainant had independent advice. Such a confidential relationship can be established in two ways, *viz*:

Class 2(a)

Certain relationships (for example solicitor and client, medical advisor and patient) as a matter of law raise the presumption that undue influence has been exercised.

Class 2(B)

Even if there is no relationship falling within Class 2(A), if the complainant proves the *de facto* existence of a relationship under which the complainant generally reposed trust and confidence in the wrongdoer, the existence of such relationship raises the presumption of undue influence. In a Class 2(B) case therefore, in the absence of evidence disproving undue influence, the complainant will succeed in setting aside the impugned transaction merely by proof that the complainant reposed trust and confidence in the wrongdoer without having to prove that the wrongdoer exerted actual undue influence or otherwise abused such trust and confidence in relation to the particular transaction impugned.

Turning to the relationship of husband and wife with regard to dispositions of property his Lordship continued:

As to dispositions by a wife in favour of her husband, the law for long remained in an unsettled state. In the 19th century some judges took the view that the relationship was such that it fell into Class 2(A) ie, as a matter of law undue influence by the husband over the wife was presumed. It was not until the decisions in *Howes v. Bishop* [1909] 2 KB 390 and *Bank of Montreal v. Stuart* [1911] AC 120 that it was finally determined that the relationship of husband and wife did not as a matter of law raise a presumption on undue influence within Class 2(A) ...

His Lordship then examined the situation where a wife may be able to demonstrate *de facto* that she did leave decisions on financial matters to her husband (p. 191):

Although there is no Class 2(A) presumption of undue influence as between husband and wife, it should be emphasised that in any particular case a wife may well be able to demonstrate that *de facto* she did leave decisions on financial affairs to her husband thereby bringing herself within Class 2(B) ie. That the relationship between husband and wife in the particular case was such that the wife reposed confidence and trust in her husband in relation to their financial affairs and therefore undue influence is to be presumed. Thus, in those cases which still occur where the wife relies in all financial matters on her husband and simply does what he suggests, a presumption of undue influence within Class 2(B) can be established solely from the proof of such trust and confidence without proof of actual undue influence ...

His Lordship examined several cases where although there was no "Class 2(A)" presumption of undue influence the courts were more ready to find that a husband had exercised undue influence over his wife in other cases, where the law treated married women "more tenderly than others". His Lordship continued:

> In my judgment this special tenderness of treatment afforded to wives by the courts is properly attributable to two factors. First, many cases may well fall into the Class 2(B) category of undue influence because the wife demonstrates that she placed trust and confidence in her husband in relation to her financial affairs and therefore raises a presumption of undue influence. Second, the sexual and emotional ties between the parties provide a ready weapon for undue influence: a wife's true wishes can easily be overborne because of her fear of destroying or damaging the wider relationship between her and her husband if she opposes his wishes.

We now come to the crucial matter in our case, the right of the claimant wife against not only her wrongdoing husband in respect of a transaction in surety case which was procured by his undue influence but also against the creditor bank. Lord Browne-Wilkinson had this to say:

> Up to this point I have been considering the right of a claimant wife to set aside a transaction as against the wrongdoing when the transaction has been procured by his undue influence. But in surety cases the decisive question is whether the claimant wife can set aside the transaction, not against the wrongdoing husband, but against the creditor bank. Of course, if the wrongdoing husband is acting as agent for the credit bank in obtaining the surety from the wife, the creditor will be fixed with the wrongdoing of its own agent and the surety contract can be set aside as against the creditor. Apart from this, if the creditor bank has notice, actual or constructive, of the undue influence exercised by the husband (and consequentially of the wife's equity to set aside the transaction) the creditor will take subject to that equity and the wife can set aside the transaction against the creditor (albeit a purchaser for value) as well as against the husband; see *Bainbrigge v. Browne* [1881] Ch D 188 and *Bank of Credit and Commerce International S A v. Aboody* [1990] 1 QB 923, 973. Similarly, in cases such as the present where the wife has been induced to enter into the transaction by the husband's misrepresentation, her equity to set aside the transaction will be enforceable against the creditor if either the husband was acting as the creditor's agent or the creditor had actual or constructive notice.
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> ... A wife who has been induced to stand as a surety for her husband's debts by his undue influence, misrepresentation or some other legal wrong has an equity as against him to set aside that transaction. Under the ordinary principles of equity, her right to set aside the transaction will be enforceable against third parties (eg, against a creditor) if either the husband was acting as the third party's agent or the third party had actual or constructive notice of the facts

> giving rise to her equity. Although there may be cases where, without artificiality, it can properly be held that the husband was acting as the agent of the creditor in procuring the wife to stand as surety, such cases will be of very rare occurrence. The key to the problem is to identify the circumstances in which the creditor will be taken to have had notice of the wife's equity to set aside the transaction.
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> The doctrine of notice lies at the heart of equity ... Therefore where a wife has agreed to stand surety for her husband's debts as a result of undue influence or misrepresentation the creditor will take subject to the wife's equity to set aside the transaction if the circumstances are such as to put the creditor on inquiry as to the circumstances in which she agreed to stand surety.

On the basis of the House of Lords case of *Barclays Bank Plc and Banco Exterior Internacional v. Mann & Others* [1995] 1 All ER 936 and *TSB Bank Plc v. Cainfleld & Another* [1995] 1 All ER 951 that there are several triable issues which arise apart from the need to demonstrate by the 2nd defendant of a *de facto* existence of a relationship under Class 2(B) mentioned in the *Barclays Bank Plc's* case which gives rise to a presumption of undue influence. The **first triable issue** is this – was the plaintiff, the bank, put on inquiry when the wife offered to stand surety for her husband's debt which was not to her financial advantage and which carried a substantial risk of the husband committing a legal or equitable wrong entitling the wife to set aside the transaction? Flowing from this, that the bank should have been put on inquiry and would have constructive notice of the wife's rights unless the bank took reasonable steps to ensure that the contract to stand surety had been properly obtained, the **second triable issue** thus is this – did the bank take such reasonable steps?

The **third triable issue** relates to the contention of the 2nd defendant that the plaintiff had entrusted the 1st defendant with the duty to obtain the consent of the 2nd defendant to execute the guarantee.

From the nature of the allegations of undue influence pleaded by the 2nd defendant in her defence and raised in her affidavit it appears that in gist she says that because of her pregnancy and her desire to have matrimonial harmony – there were continuous quarrels and also scoldings and assaults by the 1st defendant on her – she was vulnerable and succumbed to her husband's undue influence on her to sign the guarantee prepared by the bank. Implicit in these allegations is that the bank did not make any inquiry as to whether the contract to stand surety had been properly obtained since her standing surety for her husband was not to her financial advantage. Implicit also is that she was not explained the nature of the guarantee. The fact that she is an accountant is not by itself relevant to show it was properly obtained. There are matters for the court to decide after a trial.

The allegation that the bank had instructed the 1st defendant to obtain the 2nd defendant's consent to sign the guarantee is tantamount to saying that the bank as principal had authorised the 2nd defendant to act on behalf of the bank to bring the 2nd defendant into a contract with the bank. Whether that is so or not is a matter of evidence.

I believe there are triable issues and the Sessions Court judge was right in dismissing the application for summary judgment. The appeal is dismissed with costs.